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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 141

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, SUPERINTENDENT OF TAHOLAH INDIAN AGENCY, AND JAMES A. HOWARTH, JR., UNITED STATES FOREST SUPERVISOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (R. 77–82, 150–164) are reported in 28 F. Supp. 807 and 31 F. Supp. 754. The opinion of the Circuit Court of Appeals (R. 1040–1050) is reported in 118 F. (2d) 421.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 10, 1941 (R. 1050). The petition for a writ of certiorari was filed June 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Indian allotments involved in the present case are restricted against alienation.

2. Whether the Secretary of the Interior has authority under Section 8 of the Act of June 25, 1910, to prescribe regulations governing the sale of timber on restricted Indian allotments.

3. Whether the Secretary of the Interior has authority under the Act of February 14, 1920, to deduct from the gross proceeds the expenses of supervising the sale of timber from allotments on the Quinaielt Reservation.

TREATIES AND STATUTES INVOLVED

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857, 25 U. S. C. §§ 406, 407, provides:

> § 7. SALE OF TIMBER ON UNALLOTTED LANDS. The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reserva-

tion in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.

§ 8. SALE OF TIMBER ON ALLOTMENTS HELD UNDER TRUST. The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

The pertinent provisions of the Treaty of July 1, 1855, with the Quinaielt Indians, 12 Stat. 971; the Treaty of March 16, 1854, with the Omahas, 10 Stat. 1043; the General Allotment Act of February 8, 1887, c. 119, secs. 1 and 5, 24 Stat. 388, 25 U. S. C. §§ 331 and 348; and the Act of February 14, 1920, c. 75, sec. 1, 41 Stat. 415, are set forth in the Appendix, pp. 13–17, *infra.*

STATEMENT

Petitioners, on behalf of themselves and all other allottees similarly situated, sought to enjoin the United States and its officers from enforcing regulations of the Secretary of the Interior governing the sale of timber from Indian lands.

The relevant facts as found by the District Court (R. 164–180) may be summarized as follows:

The Quinaielt Reservation in the State of Washington contains about 200,000 acres and is prin-

cipally valuable for lumber production. It was created pursuant to the Treaty of July 1, 1855, with the Quinaielt Indians, 12 Stat. 971, and was subsequently enlarged by Executive Order of November 4, 1873. 1 Kappler, Indian Laws and Treaties (1904), p. 923. Almost all of the reservation has been allotted to individual Indians, many of whom do not reside on their allotments (R. 165).

Between 1923 and 1937 the Secretary of the Interior approved four contracts, each of which provided for the sale of timber on a number of allotments (R. 165–166). Petitioners and the Indians whom they represent own allotments which are covered by these contracts (R. 166). Regulations promulgated by the Secretary on April 10, 1920, were made a part of each of the contracts (R. 169). These regulations (R. 42–57) contain fifty-six separate sections which set forth detailed provisions designed, among other things, to assure the Indians of prompt and full payment, and to prevent waste and loss by fire. Section 10 requires that selective logging be practiced so as to preserve part of the merchantable timber, promote young growth and preserve forest cover and authorizes the prohibition of cutting in a strip 300 feet on each side of roads and streams.[1] Section 50 provides that not

[1] Section 10 provides:

"Selective logging, or the logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, will be practiced on all lands chiefly suitable for the production

more than 10% of the proceeds of the sale should be set aside to cover the expense of supervising the cutting and sale.

On April 23, 1936, new regulations (R. 359–385) were promulgated which among other things make the selective logging requirements more specific and reduce the deduction for expenses to 8% of the proceeds. These regulations, as amended in November 1936, provide that in the west coast timber region a strip be reserved along highways 200 feet wide in which only dead and down trees should be cut (R. 175–176).

The regulations requiring selective logging were never enforced in the Pacific Northwest before the summer of 1936 because no equipment had been devised which could selectively log such territory as the Quinaielt Indian Reservation. In 1936 the caterpillar logging tractor and the large logging transportation truck came into use and made selective logging possible (R. 170). Since that time, as the evidence shows, selective logging has been

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of timber crops. Live trees of diameters below those named in the contract may be designated for cutting, and larger trees may be reserved from cutting in the discretion of the officer in charge. If live trees which are not designated for cutting are cut, or are seriously injured through lack of care, they will be double scaled and so charged and paid for. In the discretion of the officer in charge, a strip not exceeding three hundred (300) feet in width on each side of streams, roads, and trails and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed."

enforced so as to reserve from cutting approximately 30% of the volume of the timber composed principally of the smaller and less merchantable trees (R. 608–611, 783–785, 877, 904–905).

In their amended complaint petitioners took the position that the regulations were unlawful, that they have the right to cut timber "according to their own wants and without charges or taxes," and that they were entitled to an injunction against interference with such logging (R. 112–113). The trial court ruled in favor of petitioners, holding that under the 1910 Act the Secretary of the Interior could not condition his consent upon conformance with regulations, but could only refuse to approve contracts "improvident from the standpoint of price" (R. 158). The Circuit Court of Appeals reversed, holding that the conditions under which a contract should be approved were left to the judgment of the Secretary and that the regulations were an appropriate exercise of that discretion.

While finding it unnecessary to decide whether the Secretary of the Interior was an indispensable party, the Circuit Court of Appeals further held (R. 1044–1045) that the suit should be dismissed as against the United States because it had not consented to be sued. Petitioners do not challenge this ruling. Thus, the sole question here presented is whether the court below erred in holding that the complaint does not state a cause of action against the other respondents.

ARGUMENT

1. The court below held that the allotments on the Quinaielt Reservation are subject to restrictions against alienation (R. 1045–1046). This holding is plainly correct. It is not disputed that each Indian received a restricted patent which provided that his allotment was to be held in trust by the United States for twenty-five years (R. 167).[2] However, petitioners contend (pp. 7–8, 27–28) that there was no basis for the insertion of restrictions against alienation in the patents given to Indians not residing on the reservation. This argument is predicated upon Article VI of the Treaty of 1855 with the Quinaielts, 12 Stat. 971, 973, which authorizes the President to make allotments "for a permanent home" upon the condition "that the tract shall not be aliened" (App., pp. 13, 14–15, *infra*). Since the treaty does not authorize allotments for any purpose other than a permanent home, petitioners' argument merely tends to show that allotments to Indians living off the reservation are subject to cancellation under the express terms of the treaty. The argument does not demonstrate that those allotments were free from restrictions.

Moreover, petitioners ignore the fact that the allotments were made in conformity with the Gen-

[2] The trust period has not expired, having been indefinitely extended by Executive Order (R. 828–831) and by the Act of June 18, 1934, c. 576, sec. 2, 48 Stat. 984, 25 U. S. C. § 462.

eral Allotment Act of February 8, 1887, c. 119, sec. 1, 24 Stat. 388, 25 U. S. C. § 331 (App., p. 15, *infra*), which authorized the President to issue restricted trust patents to lands on any Indian Reservation. This Court has held that, when harmonized with the Treaty of 1855, that Act authorized the allotment of timber lands on the Quinaielt Reservation to Indians not residing upon the Reservation. *United States* v. *Payne,* 264 U. S. 446, 448–449; *Halbert* v. *United States,* 283 U. S. 753, 760–762. Thus it is plain that the restrictions in the patents were properly inserted pursuant to the directions contained in the General Allotment Act.

2. The restrictions upon alienation prevent the sale of the timber growing upon the allotment as well as the sale of the land itself. *Starr* v. *Campbell,* 208 U. S. 527, 534. Prior to 1910 no general authority to sell timber from Indian lands existed (R. 1046; H. Rept. No. 1135, 61st Cong., 2d Sess.). This limitation, however, was relaxed by Sections 7 and 8 of the Act of June 25, 1910 (p. 2, *supra*). Petitioners do not contend that the limitation on the sale of timber was completely removed, for they admit (pp. 6, 9, 26, 28–30) that under Section 8 the Secretary of the Interior might absolutely refuse to consent to a sale. But they assert (p. 6) that the Secretary's approval or rejection has to be "absolute."

On the contrary, it is well established that the grant to an administrative officer of the plenary

power to approve or reject a sale includes the lesser power to "consider and determine the terms and conditions on which such sales should be approved." *United States* v. *Thurston County, Neb.*, 143 Fed. 287, 291 (C. C. A. 8). See also *Starr* v. *Campbell*, 208 U. S. 527, 533–534; *Sunderland* v. *United States*, 266 U. S. 226, 235; *Mott* v. *United States*, 283 U. S. 747, 751. Plainly, because of the number of Indians with whom he must deal, the vast area of land involved, and the many details which have to be taken into account in the logging and sale of timber, the Secretary's power under Section 8 of the Act can only be effectively administered by the use of general regulations stating the terms and conditions upon which he will consent to the sale of timber on restricted Indian allotments. *LaMotte* v. *United States*, 254 U. S. 570, 576.

To support their contention that there is no statutory authority for regulations governing the sale of timber from allotted lands, petitioners rely (pp. 8–10, 28–30) on the fact that the word "consent" is used in Section 8 while Section 7 speaks of sales "under regulations to be prescribed by the Secretary." They assert that Congress intended thereby to deny the Secretary the power to make regulations governing sales from allotted lands. The legislative history of the 1910 Act discloses no such intention but rather that the same regulatory authority was intended to be granted

as to both allotted and unallotted lands.[3] Moreover, the Department of the Interior has for thirty years consistently construed the 1910 Act as authorizing regulations governing the sale of timber from allotted as well as from unallotted lands.[4]

Contrary to petitioners' contention (pp. 6, 26) the decision of the court below is not in conflict with the decision of this Court in *United States* v. *Algoma Lumber Company,* 305 U. S. 415. That case involved contracts for the sale of timber from allotted and unallotted lands on the Klamath Reservation which "were executed pursuant to §§ 7 and 8 of the Act of 1910 and regulations of the Secretary of the Interior." The Court said (p. 421):

> The action of Congress in authorizing the sale of timber, and the contracts prescribed under its authority by departmental regulations and approved by the Secretary, are to be viewed as the means chosen for the exercise of the power of the Government to protect the rights and beneficial ownership of

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[3] See H. Rept. No. 1135, 61st Cong., 2d sess., p. 3; H. Rept. No. 1727, 61st Cong., 2d sess.; S. Rept. No. 868, 61st Cong., 2d sess.; 45 Cong. Rec., pt. VI, pp. 6085–6088; *id.*, pt. VIII, pp. 8723–8727, 8897–8901, 8982, 9102.

[4] Annual Reports, Department of the Interior, 1910, Vol. II, pp. 25–26; Regulations, June 29, 1911 (Def. Ex. 16, original); Regulations, February 5, 1918 (Def. Ex. 17, original); Regulations, April 10, 1920 (R. 42–57); Regulations and Instructions, 1927 (Def. Ex. 18, original); Regulations, April 23, 1936 (R. 359–385).

the Indians. The means are adapted to that end.

Nor does the decision below, as petitioners urge (pp. 6–7; 30–31), conflict with *United States* v. *Shoshone Tribe,* 304 U. S. 111, or *Chippewa Indians* v. *United States,* 301 U. S. 358. The regulation (R. 175–176) prohibiting cutting along stocked streams, roads, and in the vicinity of ceremonial sites, was regarded by the Secretary as in the best interests of the Indians and the court below recognized (R. 1049) that it was "not at liberty to substitute its judgment for that of the Secretary." Clearly, there is no basis for petitioners' assertion that this regulation amounts to an appropriation by the Federal Government of Indian property for public use without the payment of just compensation.

3. Specific statutory authority is found in the Act of February 14, 1920, c. 75, 41 Stat. 415, for the regulation (R. 376–378) providing that 8% is to be deducted from the gross proceeds of timber sales to cover the cost of advertising and supervising the sales. Petitioners, however, contend that if this Act were construed as applying to the Quinaielt Reservation it would violate Article X of the Treaty of 1855. In support of this contention they quote (pp. 4–5, 18, 23, 31) carefully selected excerpts from Article X. A reading of the article in its entirety (App., p. 13, *infra*) demonstrates

that petitioners' contention is wholly without foundation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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